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In The Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* RYAN T. ANDERSON, Ph.D. IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

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Amicus has studied and published on the moral, political, and jurisprudential implications of redefining marriage to eliminate the norm of sexual complementarity and has expertise that would benefit this Court. The article "What Is Marriage?" that he co-authored with Robert P. George, J.D., D.Phil. and Sherif Girgis appeared in the *Harvard Journal of Law and Public Policy*, and the book they also co-authored, *What Is Marriage? Man and Woman: A Defense*, further develops the philosophic defense of marriage as a conjugal union. It was cited twice by Justices Thomas and Alito in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In October 2014 he defended his dissertation, *Neither Liberal Nor Libertarian: A Natural Law Approach to Social Justice and Economic Rights*.

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[1] By letters on file with the Clerk, all respondents consented to this brief's filing; a joint written consent from all petitioners accompanies this brief. Pursuant to Rule 37.6, no counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amicus* or his counsel made such a monetary contribution.

SUMMARY OF THE ARGUMENT

This case is not about whether to expand the pool of people eligible to marry. Everyone is for marriage equality – for recognizing all marriages, properly understood. This case is rather about who, in our constitutional regime, gets to decide what marriage is, and about which possible definitions are constitutionally permissible. Today's debates offer rival answers to those questions, two competing substantive visions of marriage. This Court's task is not to judge the wisdom of the States' answer, reflected in their marriage laws, but only to decide whether citizens and legislators may embody in law the conjugal view of marriage, as they have historically done.

The conjugal view of marriage is eminently reasonable, as is the concern that redefining marriage might change its social meaning in ways that undermine the public goods historically served by laws defining marriage as the conjugal husband-wife union.

First, there are excellent nonsectarian and non-invidious grounds for understanding marriage as a conjugal relationship – for seeing special social value in the kind of union only a man and woman can form. We know there are *nonsectarian* grounds for this view, because nearly every culture has seen fit to recognize and regulate such bonds. And ancient thinkers aware of same-sex sexual acts – but untouched by Judaism or Christianity – affirmed that the conjugal union of man and woman has special value not realizable by same-sex or other bonds not embodied in coitus.

History also confirms that there are *non-invidious* grounds for that view – grounds impossible to ascribe

to hostility toward persons identified as gay or lesbian. First, the countless cultures that have singled out such bonds for special treatment or recognition span the spectrum of attitudes toward same-sex sexual activity. Second, some of the classical thinkers who affirm the distinct value of such bonds worked amid cultures in which same-sex sexual activity was common. They and other thinkers in their traditions affirmed the distinct value of bonds expressed, actualized, and embodied in coitus and inherently oriented to family life, even as compared to other *opposite-sex* bonds.

Second, there are also excellent grounds for thinking that changing marriage law to exclude the norm of complementarity might change the social meaning of marriage *across* society, in ways that undermine important social goals.

After all, *law shapes culture, which shapes people's behavior*. Marriage law shapes what people expect of themselves and others with respect to marriage. So if the law defines marriage as, essentially, romantic-emotional union, people can be expected to internalize this view. But because this view removes any basis of principle for norms like permanence and exclusivity, and prioritizes personal emotional fulfillment, its prevalence is likely to further destabilize the institution of marriage *across* society. This would harm the interests – primarily having to do with children's wellbeing – that involve the state in marriage. Indeed, leading LGBT activists increasingly agree that redefining marriage would undermine its norms.

But none of these harms is caused by recognizing infertile (opposite-sex) marriages, which cohere with the conjugal view.

Finally, enshrining this view of marriage in law is fully consistent with *United States v. Windsor*, 133 S. Ct. 2675 (2013).

So legitimate reasons and concerns can motivate the choice to single out opposite-sex conjugal bonds, and to decline to redefine marriage as a simple romantic-emotional union. This Court should affirm the Sixth Circuit and uphold the States' marriage laws as constitutional exercises of policy-making power.

ARGUMENT

I. At stake in State marriage laws is the public understanding of marriage, and the integrity of the institution of marriage as a lived reality.

What is misleadingly called "the gay marriage debate" is not about homosexuality, but marriage. It is not about whom to treat as eligible to marry, but about which understanding of the nature of marriage to enshrine legally. *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) ("By asking the Court to strike down DOMA as not satisfying some form of heightened scrutiny, Windsor and the United States are really seeking to have the Court resolve a debate between two competing views of marriage"). It marks a pivotal stage in a decades-long struggle between two views of marriage.

The *conjugal* view of marriage has long informed our law and social practice. Marriage so understood is a *comprehensive* union: Joining spouses *in body* as well as in mind, it is begun by consent and sealed by sexual intercourse. So completed in the acts by which new life is made, it is especially apt for – and deepened by –

procreation, and calls for that broad domestic sharing uniquely fit for family life. Uniting spouses in these all-encompassing ways, it calls for all-encompassing commitment: permanent and exclusive. Comprehensive union is valuable in itself – not merely as a means to responsible procreation and child-rearing – but its link to children's welfare is what justifies recognizing and regulating it in law.

A *revisionist* view has informed certain marriage policy changes of the last several decades. It sees marriage as essentially distinguished by an *emotional* union, fostered by consensual sexual activity (of any mutually agreeable type) and valuable for as long as romantic-emotional union ("love" considered as a feeling) lasts.

The revisionist view informs some opposite-sex as well as same-sex bonds, and brooks no real difference between them: both involve intense emotional bonding, so both can make a "marriage." But comprehensive union is something only a man and woman can form.

Yet almost all cultures, as well as important strands of our own philosophical and legal traditions, have seen marriage as bringing man and woman together in a sexual union oriented to family life, shaped by its demands (*e.g.*, norms of stability), and regulated in ways that increase the chances of children being reared by their mother and father – not as "co-parents" but as husband and wife in the matrimonial bond.

So recognizing same-sex relationships as marriages would not simply expand eligibility to marry, the way that manumitting slaves does in legal systems that

allow only free people to form (marriage) contracts. Rather, same-sex marriage recognition is better understood as replacing the aforementioned, nearly-universal understanding of what marriage is and why it is of public concern, with a new and more general view – one in which marriage is distinguished from other forms of companionship, if at all, merely by the romantic quality common and inherent to both opposite- and same-sex partnerships. And obviously law and the state have no legitimate – much less compelling – interest in the romantic lives of citizens as such.

There is therefore no direct line from the principle of equality to redefining marriage to abolish the norm of sexual complementarity. Everyone is in favor of "marriage equality" – everyone wants the laws to treat all marriages the same way. To know whether a policy does so, one must first determine what marriage is and how its recognition serves the public interest. This case pits two views of marriage against each other. Yet the Court is charged with judging not the correctness of either view, but merely whether the conjugal view is *reasonable*, and valuable for important public interests – and thus acceptable for the people and their representatives to choose. *See Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) ("The Constitution does not codify either of [the conjugal or revisionist] views of marriage.")

Amicus shows that citizens have excellent reasons to affirm that view, and to expect the redefining of civil marriage to undermine public interests. That first point alone is sufficient to show a crucial basis in the

common good for State marriage laws; the second reinforces it.

II. States have compelling reasons for firmly teaching through law that marriage is a union of man and woman.

Any community is created by common action – by cooperative activity, defined by common goods, in the context of commitment. The activities and goods build up that bond and determine the commitment it requires.

For example, a scholarly community exists whenever people commit to cooperate in activities ordered toward gaining knowledge. These activities and the truths they uncover build up their bond and determine the sort of commitment (to academic integrity) scholars owe each other.

The kind of union created by marriage is comprehensive in just these ways: in (1) how it unites persons, (2) what it unites them with respect to, and (3) how extensive a commitment it demands.

It unites two people (1) in their most basic dimensions, in mind *and* body; (2) with respect to procreation, family life, and its broad domestic sharing; and (3) permanently and exclusively.[2]

As to (1): The bodily union of two people is much like the union of organs in an individual. Just as one's organs form a unity by coordinating for the biological

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[2] *Amicus* expands on this argument in Chapter 2, "Comprehensive Union," of Sherif Girgis et al., *What Is Marriage? Man and Woman: A Defense* (2012).

good of the whole (one's bodily life), so the bodies of a man and woman form a unity by coordination (coitus) for a biological good (reproduction) of the couple as a whole. In choosing such biological coordination, spouses unite bodily, and do not merely touch. Non-marital bonds are, by contrast, only unions of heart and mind.

Second, marriage is oriented to procreation, family life, and thus a comprehensive range of goods. The kind of act that makes marital love is also the one that makes new life, creating new participants in every type of good. So marriage itself, the bond so embodied, would be fulfilled by family life, and by the all-around domestic sharing uniquely apt for it. By contrast, ordinary friendships – unions of heart and mind through conversations and other activities – can have more limited and variable scope.

Third, in view of its comprehensiveness in these other senses, marriage inherently calls for comprehensive commitment, both permanent and exclusive. Indeed, such comprehensive union can be achieved *only* by two people, because no act can organically unite three or more people bodily.

Moreover, marriage is uniquely apt for having and rearing children, an inherently open-ended task calling for unconditional commitment. So its norms fittingly create the stability and harmony suitable for child-rearing. That stability is undermined by divorce and infidelity, which create fragmented and often fatherless families.

Indeed, only the conjugal view explains why spouses should pledge *sexual* exclusivity at all. If instead marriage is essentially an emotional union, this is

impossible to explain. After all, sex is just one of many pleasing activities that foster tenderness, and some partners regard sexual openness as better for lasting companionship. But the conjugal view is not arbitrary in picking out sexual activity as central to exclusivity, since it distinguishes marriage by the type of cooperation, defined by the common ends, that it involves: bodily union and its natural fulfillment in family life.

While people in other bonds may pledge and live out permanent sexual exclusivity as a matter of subjective preference, only conjugal union objectively requires such a commitment if it is to be realized fully. Only in conjugal marriage is there a principled basis for these norms apart from what spouses may prefer. As shown below in Part V.D, this is borne out by reasoned reflection, revisionists' own arguments, and recent policy proposals.

Because the conjugal view best explains the other norms of marriage, citizens and lawmakers have excellent reasons to affirm it.

III. Intellectual and cultural history corroborates the idea that male-female sexual unions have special value, and refutes the charge that only Jewish or Christian theology, or animus against those identified as gay or lesbian, could motivate this view.

Many cultures and thinkers have understood marriage as a stable sexual union of man and woman, apt for family life. It is historically impossible to attribute these cultural and intellectual traditions to

any one religion, or to hostility toward people identifying as homosexual. They provide a nonsectarian rational basis for concluding that the conjugal union of husband and wife has distinctive value. And they confound the idea that only animus could motivate such a view.

For millennia, cultures around the world have regulated male-female sexual unions in particular, with a view to children's needs. As one historian observes, "Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."[3]

Likewise in this country, courts have held "the procreation of children under the shield and sanction of the law" is a "principal end[] of marriage," *Sharon v. Sharon*, 75 Cal. 1, 33 (1888) (citation omitted), which in turn "exists as a protected *legal* institution primarily because of societal values associated with the propagation of the human race," *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. App. 1974) (emphasis added).

Major intellectual traditions have affirmed the special value of male-female bonds. Plato wrote favorably of legislating to have people "couple[], male and female, and lovingly pair together, and live the rest of their lives" together.[4] For Aristotle, the foundation of political community was "the family group," by which

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[3] G. Robina Quale, *A History of Marriage Systems* 2 (1988).

[4] Plato, 4 The Dialogues of Plato 407 (Benjamin Jowett trans. & ed., Oxford Univ. 1953) (360 B.C.).

he "mean[t] the nuclear family."[5] In Aristotle's view, indeed, "between man and wife friendship seems to exist by nature," and their conjugal union has primacy even over political union.[6]

Likewise, the ancient Greek historian Plutarch wrote approvingly of marriage as "a union of life between man and woman for the delights of love and the begetting of children."[7] He considered marriage a distinct form of friendship, specially embodied in "physical union" of coitus.[8] And for Musonius Rufus, the first-century Roman Stoic, a "husband and wife" should "come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them . . . even their own bodies."[9]

Not one of these thinkers was Jewish or Christian, or even influenced by Judaism or Christianity. Nor were they ignorant of same-sex sexual relations, which were common, for example, between adult and

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[5] Alberto Moffi, *Family and Property Law, in Cambridge Companion to Ancient Greek Law* 254 (Michael Gagarin & David Cohen eds. 2005).

[6] Aristotle, *Ethics*, in 2 The Complete Works of Aristotle 1836 (Jonathan Barnes ed., rev. Oxford trans. 1984).

[7] Plutarch, *Life of Solon*, in 20 Plutarch's Lives 4 (Loeb ed. 1961).

[8] Plutarch, *Erotikos* 769 (Loeb ed. 1961).

[9] Musonius Rufus, *Discourses XIIIA*, in Cora E. Lutz, *Musonius Rufus "The Roman Socrates,"* Yale Classical Studies (1947) https://sites.google.com/site/thestoiclife/the_teachers/musonius-rufus/lectures/13-0.

adolescent males in Greece. No one imagines that these great thinkers were motivated by sectarian religious concerns, ignorance, or hostility of any type toward anyone. Yet they reasoned their way to the view that male-female sexual bonds have distinctive and profoundly important value.

Indeed, the anthropological evidence of a nearly perfect global consensus on sexual complementarity in marriage supports broader conclusions: First, no particular religion is uniquely responsible for this view. And second, it cannot be ascribed simply to animus against people identifying as homosexual, gay or lesbian, or same-sex attracted. After all, it has prevailed in societies that have spanned the spectrum of attitudes toward homosexuality – including ones *favorable* toward same-sex acts, and others lacking anything like our concept of gay identity. Truly, as the court of appeals noted, "[i]t is not society's laws or for that matter any religion's laws, but nature's laws (that men and women complement each other biologically), that created the policy imperative." 14-556 Pet. App. 34a (Pet. App.).

So something besides religion and animus can motivate the view that the uniquely comprehensive union of man and woman embodied in coitus has special value. That something is a rational judgment shared across history and cultures, and affirmed by the great philosophers and teachers of mankind, from Socrates to Gandhi – which petitioners and the court of appeals dissent would discard in favor of "eight days . . . of testimony from sociologists, economists, law professors, a psychologist, a historian, a demographer, and a county clerk." Pet. App. 77a.

IV. The Conjugal View Explains the State's Interest in Recognizing Marriage.

Why does the state recognize marriage but not other close bonds? It has an interest in supporting the stabilizing norms of marriage because marriage is uniquely apt for family life. Only male-female sexual relationships produce new human beings – who have the best chance of reaching maturity and contributing socially when reared by their own committed mother and father. But family stability requires strong social norms guiding people's choices toward their (and others') long-term interests.

As the eminent social scientist James Q. Wilson wrote, "Marriage is a socially arranged solution for the problem of getting people to stay together and care for children that the mere desire for children, and the sex that makes children possible, does not solve."[10] The law addresses this problem by shaping how people understand marriage—and thus how they act *toward and within* it. It thus vindicates children's right to be reared in the loving and committed bond of the man and woman – the husband and wife, the father and mother – whose union brought them into being, as members of a family. It also curbs negative externalities on innocent parties, as family fragmentation imposes costs across society.

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[10] James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* 41 (2002).

Studies that control for other factors, including poverty, show that children reared in intact homes do best on the following indices:[11]

- *Educational achievement:* literacy and graduation rates
- *Emotional health:* rates of anxiety, depression, substance abuse, and suicide
- *Familial and sexual development:* strong sense of identity, timing of onset of puberty, rates of teen and out-of-wedlock pregnancy, and sexual-abuse rates
- *Child and adult behavior:* rates of aggression, attention deficit disorder, delinquency, and incarceration

Consider the conclusions of the left-leaning research institution Child Trends:

> [T]he family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents. . . . [I]t is not simply the presence of two parents, . . . [but] of *two*

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[11] See *Marriage and the Public Good: Ten Principles* 9–19 (Witherspoon Inst. 2008), winst.org/wp-content/uploads/WI_Marriage_and_the_Public_Good.pdf.

biological parents that seems to support children's development.[12]

Several other literature reviews corroborate the importance of intact households for children.[13] Their authors and publishers span the spectrum of political and social thought, and moreover are not driven by religious views.

These outcomes seem to be due partly to the fact that mothers and fathers typically have different parenting strengths. Girls growing up fatherless are likelier to suffer sexual abuse and to have children as teenagers and out of wedlock.[14] Boys reared without

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[12] Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do about It?*, Child Trends Research Brief 1–2 (June 2002), www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf (emphasis in original).

[13] See, e.g., Sara McLanahan, Elisabeth Donahue & Ron Haskins, *Introducing the Issue, Future of Children* 3–12 (Fall 2005), *available at* http://futureofchildren.org/futureofchildren/publications/docs/15_02_01.pdf; Mary Parke, *Are Married Parents Really Better for Children?: What Research Says about the Effects of Family Structure on Child Well-Being*, CLASP Policy Brief No. 3 (May 2003), *available at* http://www.clasp.org/publications/Marriage_Brief3.pdf; W. Bradford Wilcox et al., *Why Marriage Matters: Twenty-Six Conclusions from the Social Sciences* (2d ed. 2005).

[14] Bruce J. Ellis et al., *Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?*, 74 Child Dev. 801, 801–21 (2003); Wilcox, *supra* note 13, at 17–18, 31–32; *see also* generally Lorraine Blackman et al., *The Consequences of Marriage for African Americans: A Comprehensive*

their father have higher rates of aggression, delinquency, and incarceration.[15]

As Rutgers sociologist David Popenoe concludes, social-science evidence suggests "that gender-differentiated parenting is important for human development and that the contribution of fathers to childrearing is . . . irreplaceable."[16] He continues: "The two sexes are different to the core, and each is necessary – culturally and biologically – for the optimal development of a human being."[17]

In a summary of the "best psychological, sociological, and biological research to date," University of Virginia sociologist W. Bradford Wilcox finds that "men and women bring different gifts to the parenting enterprise, that children benefit from having parents with distinct parenting styles, and that family

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Literature Review (2005); Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* (1994).

[15] See Paul R. Amato, *The Impact of Family Formation Change on the Cognitive, Social, and Emotional Well-Being of the Next Generation*, 15 Future of Children 75, 75–96 (Fall 2005), *available at* http://futureofchildren.org/futureofchildren/publications/docs/15_02_05.pdf; Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. Res. on Adolescence 369–97 (2004).

[16] David Popenoe, *Life without Father: Compelling New Evidence That Fatherhood and Marriage Are Indispensable for the Good of Children and Society* 146 (1996).

[17] *Id.* at 197.

breakdown poses a serious threat to children and to the societies in which they live."[18]

A second public benefit of marriage is its tendency to help spouses financially, emotionally, physically, and socially. After marrying, for example, men tend to spend more time at work, less time at bars, more time at religious gatherings, less time in jail, and more time with family.[19] Yet as discussed below in Part V, it is the conjugal view of marriage that makes sense of and reinforces these stabilizing norms. Replacing that understanding of marriage with a competing vision is likely to have just the opposite effect.

Third, given marriage's economic benefits, its decline most hurts the least fortunate, as Kay Hymowitz argues in *Marriage and Caste in America*.[20] Indeed, a leading indicator of whether someone will experience poverty versus prosperity is whether she knew growing up the love and security of her married mother and father.

Finally, since a strong marriage culture is good for children, spouses, the local and national economy, and

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[18] W. Bradford Wilcox, *Reconcilable Differences: What Social Sciences Show about the Complementarity of the Sexes and Parenting*, Touchstone 32, 36 (November 2005).

[19] Steven Nock, *Marriage in Men's Lives* (1998). By "marriage," Nock specifically is discussing only the union of husband and wife.

[20] Kay S. Hymowitz, *Marriage and Caste in America: Separate and Unequal Families in a Post-Marital Age passim* (2006); see also W. Bradford Wilcox, *The Evolution of Divorce*, Nat'l Affairs 81, 88-93 (Fall 2009) available at http://www.nationalaffairs.com/doclib/20091229_Wilcox_Fall09.pdf.

especially the poor, it also helps limit the cost and role of government. Where marriages rarely form, or easily and frequently dissolve, the state expands to fill the domestic vacuum by lawsuits to determine paternity, visitation rights, child support, and alimony. These also lead to increased policing and social services. Sociologists David Popenoe and Alan Wolfe's research on Scandinavian countries shows that as marriage culture declines, the size and scope of state power – and thus government spending – tend to grow.[21]

In fact, a study by the left-leaning Brookings Institution finds that $229 billion in welfare expenditures over 25 years can be attributed to the exacerbation of social ills by family breakdown: teen pregnancy, poverty, crime, drug abuse, and health problems.[22] A 2008 study found that divorce and unwed childbearing cost taxpayers "*at least* $112 billion" each year.[23] Thus, research confirms that several aspects of the common good depend on a strong marriage culture.

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[21] David Popenoe, *Disturbing the Nest: Family Change and Decline in Modern Societies* xiv–xv (1988); Alan Wolfe, *Whose Keeper? Social Science and Moral Obligation* 132–42 (1989).

[22] Isabel V. Sawhill, *Families at Risk, in Setting National Priorities: The 2000 Election and Beyond* 97, 108 (Henry J. Aaron & Robert D. Reischauer eds., 1999); see also *Marriage and the Public Good*, supra note 11, at 15.

[23] Benjamin Scafidi, *The Taxpayer Costs of Divorce and Unwed Childbearing: First-Ever Estimates for the Nation and for All Fifty States* 5 (New York: Institute for American Values 2008), http://www.americanvalues.org/search/item.php?id=52 (emphasis in original).

V. Redefining Marriage Would Not Extend Its Stabilizing Norms, But Undermine Them Across Society.

Redefining civil marriage will obscure the true nature of marriage and undermine the principled basis of its norms, and, over time, people's adherence to them. This will harm spouses, children, and the larger community. The arguments of *amicus* here depend on three simple ideas:

1. Law tends to shape beliefs.
2. Beliefs shape behavior.
3. Beliefs and behavior affect human interests and human well-being.

Amicus does not propose changing the controlling constitutional standard, under which marriage laws are valid if they rationally advance legitimate ends.[24] That standard does not require evidence that different laws would cause more harm. *Amicus* discusses harms here only because they *reinforce* the sufficient reasons given above for enshrining the conjugal view.

A. If sexual complementarity is merely incidental, then so are marital norms like permanence, monogamy, exclusivity, and even sexual union.

Some argue that redefined marriage would only spread stability. But there is nothing magical about the word "marriage" that promotes marital norms, however

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[24] Respondents' arguments on that point find further support in *McDonald v. Chicago*, 561 U.S. 742, 766-771 (2010).

applied. The law encourages these norms by promoting an understanding of marriage that makes sense of them.

Yet marital norms make no sense as requirements of *principle* (as opposed to preference), if marriage is just whatever same- and opposite-sex couples can have in common, namely, intense emotional regard. There is no reason of principle why emotional union should be permanent. Or limited to two persons, rather than including larger ensembles. Or sexually exclusive, rather than "open." Or sexual at all, rather than integrated around other activities (say, where sex would remain illegal – as between relatives). Or inherently oriented to family life and shaped by its demands. Couples may live out these norms, but *there is no reason of principle for them to do so*, and no basis for using the law to encourage them to do so.

In other words, if sexual complementarity is optional for marriage, present only where preferred, then so is almost every other norm that sets marriage apart. If laws defining marriage as a male-female union unjustly discriminate against same-sex relationships because the latter can have loving emotional bonds, then excluding people in "throuples" or other polyamorous (multiple-partner) emotional bonds is equally unjust. Sexual complementarity and other historic norms of marriage logically stand or fall together – as the arguments and advocacy of many leading LGBT activists confirms. *See infra* Part V.D.

B. Promoting the revisionist view makes conjugal union harder to live out.

No one acts in a void. We all take cues from cultural norms, shaped by the law. Prominent Oxford philosopher Joseph Raz, who does not share *amicus*'s commitment to the conjugal view of marriage, explains the inevitable and sweeping consequences of changing marriage laws:

> [O]ne thing can be said with certainty [about recent changes in marriage law]. They will not be confined to adding new options to the familiar heterosexual monogamous family. They will change the character of that family. If these changes take root in our culture then the familiar marriage relations will disappear. They will not disappear suddenly. Rather they will be transformed into a somewhat different social form, which responds to the fact that it is one of several forms of bonding, and that bonding itself is much more easily and commonly dissoluble. All these factors are already working their way into the constitutive conventions which determine what is appropriate and expected within a conventional marriage and transforming its significance.[25]

Redefining civil marriage would change its meaning *for everyone*, not merely expand access to the institution as it has historically existed. Legally recognized opposite-sex unions would increasingly be

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[25] Joseph Raz, *Autonomy and Pluralism, in The Morality of Freedom* 393 (Oxford: Clarendon Press 1988).

defined by what they had in common with same-sex relationships.

By obscuring the principled basis of the stabilizing norms of marriage, redefining marriage would increase marital instability, harming spouses and children.

Permanence and exclusivity – both those principles and actions pursuant thereto – depend on the conjugal view. *See supra* Part II. By the same token, these norms are undermined by the revisionist view. *See supra* Part V.A. Yet law affects behavior. So as more people absorb the new law's message, we can expect marriages to take on still more of emotion's inconstancy.[26]

Because there is no *reason* that emotional unions – any more than the emotions that define them, or general friendship – should be permanent or limited to two, these norms of marriage would make less sense. People would thus feel less bound to live by them whenever preference dictated otherwise. And being less able to understand the value of marriage itself as a certain sort of union, even apart from its emotional satisfactions, they would overlook reasons for marrying or staying with a spouse as feelings waned, or waxed for others.[27] Far from conservative scaremongering,

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[26] *See* Andrew J. Cherlin, *The Marriage-Go-Round: The State of Marriage and Family in America Today* (2009), for a discussion of the link between the rise of expressive individualism and the divorce revolution.

[27] *See*, e.g., W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate versus Institutional Models of Marriage*, 39 Soc. Sci. Res. 687, 687–699 (2010). For research showing that

these implications have been embraced by many leading LGBT advocates. *See infra* Part V.D.

But children and spouses benefit in many concrete ways from marital stability. These interests – interests justifying the legal recognition and regulation of marriage – also count decisively against redefining it.

C. Redefining marriage would obscure the special importance of biological parents, and of mothers and fathers generally, to children's detriment.

Conjugal marriage laws communicate the message that a conjugal union is, on the whole, the most appropriate environment for rearing children, as the best available social science suggests. *See supra* Part IV.

Recognizing same-sex relationships as marriages would legally abolish that ideal. No civil institution would reinforce the notion that men and women typically have different strengths as parents. Indeed, our law, public schools, and media would teach that mothers and fathers are fully interchangeable, and that only bigots think otherwise.

The central problem with that: it would diminish the motivations for men and women having children to marry *first*, and for husbands to remain with their wives and biological children. Yet the resulting

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same-sex unions tend more often to eschew sexual exclusivity, see Scott James, *Many Successful Gay Marriages Share an Open Secret*, N.Y. Times, Jan. 28, 2010, *available at* http://www.nytimes.com/2010/01/29/us/29sfmetro.html?ref=us.

arrangements – parenting by divorced or single parents, or cohabiting couples; and disruptions of any kind – are demonstrably worse for children. The concern is with how redefining marriage will impact parenting as a whole, not simply with same-sex parenting. So even if studies showed no differences between same- and opposite-sex adoptive parenting, redefining marriage would destabilize marriage in ways we know hurt children.

Redefining civil marriage to make it centrally about adult romance might well make it more socially acceptable for unmarried parents to put off firmer commitment, for fathers to leave their families, or for children to be created for a household without a mother or father. But whatever the cause, there will be a cost as more children lack the care of their own married mother and father.[28]

D. Many LGBT activists agree – even embrace the result – that eliminating the norm of sexual complementarity will weaken other norms of marriage.

The point that the revisionist view erodes the basis for permanence and exclusivity in *any* relationship is increasingly confirmed by revisionists' own rhetoric and arguments, and by the policies they are increasingly led to embrace.

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[28] The question of which arrangements our policies should privilege is normative; it cannot be settled by cause-and-effect descriptions of social science alone. But that scarcely matters here, because it is impossible to generalize from available studies purporting to find no differences between same-sex and married biological parenting.

Thus, in their statement "Beyond Same-Sex Marriage," more than 300 "LGBT and allied" scholars and advocates – including prominent Ivy League professors – call for recognizing sexual relationships involving more than two partners.[29]

And they do exist: *Newsweek* reports that there are more than *500,000* multiple-partner households in the United States alone.[30] In Brazil, a public notary has recognized a trio as a civil union.[31] Mexico City has considered expressly temporary marriage licenses.[32] The Toronto District School Board has taken to promoting polyamorous relationships among its students.[33]

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[29] *Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships*, BeyondMarriage.org, July 26, 2006, http://beyondmarriage.org/full_statement.html.

[30] Jessica Bennett, *Only You. And You. And You: Polyamory—Relationships with Multiple, Mutually Consenting Partners—Has a Coming-Out Party*, Newsweek, July 28, 2009, http://www.newsweek.com/2009/07/28/only-you-and-you-and-you.html.

[31] *Three-Person Civil Union Sparks Controversy in Brazil*, BBC News, Aug. 28, 2012, http://www.bbc.co.uk/news/world-latin-america-19402508.

[32] *Mexico City Proposes Temporary Marriage Licenses*, Telegraph, Sept. 30, 2011, http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/8798982/Mexico-City-proposes-temporary-marriage-licences.html.

[33] *Toronto School District Board Promotes Polygamy, Group Sex to Children*, BlazingCatFur, http://blazingcatfur.blogspot.com/2012/09/tdsb-promotes-polygamy-group-sex-to.html.

And exclusivity? Consider this candid piece in *The Advocate*, a gay-interest newsmagazine: "[W]hat if – for once – the sanctimonious crazies are right? Could the gay male tradition of open relationships actually alter marriage as we know it? And would that be such a bad thing?"[34]

Other revisionists have embraced the goal of weakening marriage *in these very terms*. It is "correct," says revisionist advocate Victoria Brownworth, to think ". . . that allowing same-sex couples to marry will weaken the institution of marriage. . . . It most certainly will do so, and that will make marriage a far better concept than it previously has been."[35] Michelangelo Signorile, a prominent revisionist advocate, urges same-sex couples to seek legal recognition "not as a way of adhering to society's moral codes but rather to debunk a myth and radically alter an archaic institution"[36] and thereby "transform the notion of 'family' entirely."[37]

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[34] Ari Karpel, *Monogamish*, Advocate, July 7, 2011, http://www.advocate.com/Print_Issue/Features/Monogamish/.

[35] Victoria A. Brownworth, *Something Borrowed, Something Blue: Is Marriage Right for Queers?, in I Do / I Don't: Queers on Marriage* 53, 58-59 (Greg Wharton & Ian Philips eds., San Francisco: Suspect Thoughts Press 2004).

[36] Michelangelo Signorile, *Bridal Wave*, OUT, December/January 1994, at 68, 161.

[37] *Id.*

Leading revisionist advocates increasingly agree that redefining marriage would undermine its stabilizing norms.

E. Preliminary social science also suggests that opposite- and same-sex bonds tend to follow different norms.

Preliminary social science also suggests that different norms tend to make sense for opposite- and same-sex bonds. In the 1980s, David McWhirter and Andrew Mattison set out to disprove popular beliefs about same-sex male partners' lack of adherence to sexual exclusivity. Of those they surveyed, whose relationships had lasted from one to thirty-seven years, more than 60 percent had originally expected sexual exclusivity, but not one couple stayed exclusive longer than five years.[38]

More recently, the *New York Times* reported on a San Francisco State University study: "[G]ay nuptials are portrayed by opponents as an effort to rewrite the traditional rules of matrimony. Quietly, outside of the news media and courtroom spotlight, many gay couples are doing just that."[39]

One study even suggests that exclusivity affects men's satisfaction in opposite-sex relationships more

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[38] David P. McWhirter & Andrew M. Mattison, *The Male Couple: How Relationships Develop* 252-53 (Englewood Cliffs, N.J.: Prentice-Hall Trade 1984).

[39] James, *Many Successful Gay Marriages Share an Open Secret*, *supra*.

than in same-sex ones.[40] According to another, sexually open gay relationships last longer.[41] By contrast, 99 percent of opposite-sex spouses demand of each other and anticipate sexual exclusivity,[42] and violations of it are "the leading cause of divorce across 160 cultures and are one of the most frequent reasons that couples seek marital therapy."[43]

Relationship longevity, too, tends to vary. A study of same-sex civil marriages in Norway and Sweden found that "divorce risks are higher in same-sex partnerships than opposite-sex marriages and . . . unions of lesbians are considerably less stable, or more dynamic, than unions of gay men."[44]

Early evidence thus suggests that different norms prevail among same- and opposite-sex bonds.

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[40] Trevor A. Hart & Danielle R. Schwartz, *Cognitive-Behavioral Erectile Dysfunction Treatment for Gay Men*, 17 Cognitive & Behav. Prac. 66, 66-76 (2010).

[41] James, *Many Successful Gay Marriages Share an Open Secret*, *supra*.

[42] Alfred DeMaris, *Distal and Proximal Influences on the Risk of Extramarital Sex: A Prospective Study of Longer Duration Marriages*, 46 J. Sex Res. 597, 597-607 (2009).

[43] Julie H. Hall & Frank D. Fincham, *Psychological Distress: Precursor or Consequence of Dating Infidelity*, 35 Personality & Soc. Psychol. Bull. 143-59 (2009).

[44] Gunnar Andersson, Turid Noack, Ane Seierstad & Harald Weedon-Fekjaer, *The Demographics of Same-Sex Marriages in Norway & Sweden*, 43 Demography 79, 95 (2006).

VI. Recognizing the marriages of infertile opposite-sex couples does not undermine the State's rationale for upholding the conjugal view of marriage.

It is a mistake to think the conjugal view leaves no principled basis for recognizing infertile couples' unions but not same-sex couples.

After all, (1) an infertile man and woman can still form a comprehensive (bodily as well as emotional) union, which differs only in degree, not type, from fertile ones before or after their first child. So recognizing such unions has (2) none of the costs of recognizing same-sex bonds; (3) most of the benefits of recognizing fertile ones; and (4) one additional benefit.

A. Infertile conjugal unions are still true marriages.

To form a true marriage, a couple needs to establish and live out the (1) comprehensive (*i.e.*, mind-and-body) union that (2) would be completed by, and apt for, procreation and domestic life, and so (3) inherently calls for permanent and exclusive commitment.

Every male-female couple capable of consummating their commitment can have all three features. With or without children, on the wedding night or years later, these bonds are all comprehensive in the three senses specific to marriage, with its distinctive value. No same-sex or multiple-partner union is.

B. Recognizing infertile conjugal unions has none of the costs of redefining marriage.

Since infertile couples can form a true marriage, recognizing them has none of the costs of recognizing same-sex, polyamorous, or other nonmarital relationships. It does not make it harder for people to realize the basic human good of marriage, for it does not undermine the public's grasp of the nature of marriage as a conjugal union. Nor does it undermine marital norms, which are grounded in that nature, or make fathers or mothers seem superfluous.

C. Recognizing such unions has many of the benefits of recognizing fertile unions.

Many couples believed to be infertile end up having children, who are served by their parents' marriage; and trying to determine fertility would require unjust invasions of privacy.

Furthermore, even an obviously infertile couple can for reasons of principle, and not merely subjective preference, live out the features of true marriage, and so contribute to a strong marriage culture. Their example makes couples who might conceive likelier to form a marriage and abide by its norms. That, in turn, ensures more children are reared by their married biological parents.

Moreover, it is rare for both spouses to be infertile. And where spouses remain faithful to their marriage vows, the fertile spouse does not create any children outside of marriage. So encouraging stability and

fidelity in such bonds serves the state's interests in this way, too.

Finally, recognizing only fertile marriages would suggest marriage is valuable only as a means to children – and not good in itself, as in truth it is. So recognizing infertile marriages serves one purpose *better* than recognizing fertile unions does: to teach the truth, itself crucial for marriage stability, that marriage – considered, as it historically has been, as a conjugal union – is valuable in itself.

Thus, the more fully spouses (including infertile ones) live out the truth about what marriage is, the more that truth will pervade our culture, and the more likely it is that families *with* children stay intact.

VII. Upholding State marriage laws is consistent with *Windsor*.

State laws defining marriage as the union of a man and a woman suffer none of the infirmities *Windsor* found in the federal Defense of Marriage Act ("DOMA"). In fact, *Windsor*'s logic and holding affirm the States' prerogative to define civil marriage, as the court of appeals correctly held. Pet. App. 25a.

As *Windsor* held, "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'" *Id.* at 2691 (citations omitted). It was "DOMA's unusual deviation from the usual tradition of . . . accepting state definitions of marriage" that provided "strong evidence" of unconstitutionality and "especially require[d] careful consideration." *Id.* at 2693.

Under that careful scrutiny, this Court struck down DOMA's Section Two (defining marriage for federal purposes as a male-female union) *on State-protective grounds* – which are, of course, logically inapplicable against the States.

In particular, the Court observed that "the State [of New York had] acted" to acknowledge "a relationship deemed by the State worthy of dignity." *Id.* at 2692. For the Court, the problem with DOMA was its attempt "to injure the very class New York [sought] to protect." *Id.* at 2693. It was "[b]y doing so" – by targeting a *State-recognized* domestic relation – that DOMA violated "basic due process and equal protection principles applicable to the *Federal* Government." *Id.* (emphasis added). *See also id.* (DOMA "impose[s] a disadvantage . . . upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."); *id.* at 2694 (faulting DOMA for "diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect") (emphasis added); *id.* at 2695 (DOMA "demean[s] those persons who are in a *lawful* same-sex marriage") (emphasis added). The problem, in short, was DOMA's attempt to "interfere with state sovereign choices about who may be married." *Id.* at 2693.

That is why *Windsor*'s "opinion and its holding are confined to" unions recognized as marriages under State law. *Id.* at 2696; *see also id.* ("The Court does not have before it, *and the logic of its opinion does not decide*, the distinct question whether the States" may limit marital status to male-female bonds.) (Roberts, C.J., dissenting) (emphasis added); *id.* at 2709 ("[S]tate courts can distinguish today's case when the issue

before them is state denial of marital status to same-sex couples.") (Scalia, J., dissenting). The court of appeals properly recognized this. Pet. App. 25a-26a.

But the marriage laws at issue do not undermine the States' prerogative to define marriage or, therefore, trigger the same "careful consideration" as DOMA. Nor do they disadvantage relationships recognized by a State in its authority over domestic relations. To the contrary, they are *exercises* of that authority. *Baker v. Nelson*, 409 U.S. 810 (1972). Nothing in *Windsor* requires striking down these laws or scrutinizing them more closely. Far from condemning a State's right so to determine its marriage policy, *Windsor*'s logic reinforces it.

As *amicus* has noted elsewhere, petitioners in seeking to overturn the marriage laws of the four states of the Sixth Circuit must prove that the man-woman marriage policy that has existed in the United States since before its founding is prohibited by the Constitution:

> The only way someone could succeed in such an argument is to adopt a view of marriage that sees it as an essentially genderless institution based only on the emotional needs of adults and then declare that the U.S. Constitution requires that the states (re)define marriage in such a way. Equal protection alone is not enough. To strike down marriage laws, the Court would need to say that the vision of marriage that our law has long applied equally is just wrong: that the Constitution requires a different vision entirely.

> The U.S. Constitution, however, is silent on what marriage is and what policy goals the states should design it to serve, and there are good policy arguments on both sides. Judges should not insert their own policy preferences about marriage and declare them to be required by the U.S. Constitution any more than the Justices in *Dred Scott* [*v. Sandford*, 60 U.S. 393 (1857)] should have written into the Constitution their own policy preferences in support of slavery.
>
> That, of course, is not to suggest that same-sex marriage is itself comparable to slavery. The point is simply that, as in *Dred Scott*, this is a debate about whether citizens or judges will decide an important and sensitive policy issue – in this case, the very nature of civil marriage.[45]

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[45] Gene Schaerr and Ryan T. Anderson, Ph.D., *Memo to Supreme Court: State Marriage Laws Are Constitutional*, Heritage Foundation Legal Memorandum No. 148, March 10, 2015, http://www.heritage.org/research/reports/2015/03/memo-to-supreme-court-state-marriage-laws-are-constitutional.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals, and overturn the contrary decisions of the other circuits.

Respectfully submitted,

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